



Ohio Board of Professional Conduct

OPINION 2019-1

Issued February 8, 2019

Withdraws 1988-024

Representation of Adverse Party in Unrelated Matters

SYLLABUS: Absent informed consent, a lawyer may not undertake representation of an adverse party in an unrelated matter when the lawyer represents current clients with claims pending against the adverse party. A lawyer may not withdraw from the representation of a current client in order to undertake representation of an adverse party, even if the matters are unrelated. Absent informed consent, a lawyer may not represent a former adverse party in a new matter against a former client if the new matter is the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. A lawyer who is unable to undertake representation of a prospective client due to a conflict may recommend another lawyer or list of lawyers, so long as the lawyer does so in good faith.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

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APPLICABLE RULES: Prof.Cond.R. 1.0, 1.1, 1.3, 1.7, 1.9, 1.16, 4.3

QUESTIONS PRESENTED: A lawyer has represented claimants in workers' compensation cases. Recently, the lawyer was approached by employers who wish to hire the lawyer to represent them in workers' compensation matters. One or more of the lawyer's prior clients (claimants) are employees of the same employers who now wish for the lawyer to represent the employers. The lawyer also has current clients with pending workers' compensation matters.

1. May a lawyer who currently represents clients (claimants) in workers' compensation claims pending against an employer undertake representation

of the current clients' employer in workers' compensation matters unrelated to the clients?

- a. May the lawyer withdraw from representation of current clients in order to undertake representation of the current clients' employer in unrelated workers' compensation matters?
2. May a lawyer represent an employer in a new matter against former clients whom the lawyer has represented as claimants in the past?
3. May a lawyer who is unable to represent a prospective client in matters against a former or current client refer the prospective client to another lawyer?

OPINION:

Question (1)

A lawyer's acceptance of representation of a client creates a conflict of interest if the representation of that client will be directly adverse to another current client or if there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, a third person, or by the lawyer's own personal interest. Prof.Cond.R. 1.7(a)(1)-(2). Because the principles of loyalty and independent judgment are fundamental to the client-lawyer relationship, neither the interests of other clients nor the lawyer's personal interest should be permitted to dilute the lawyer's loyalty to the client. Prof.Cond.R. 1.7, cmt. [1].

The first consideration is whether the lawyer's acceptance of the prospective client will result in the direct adversity between the lawyer's prospective client and current clients. In litigation, the representation of one client is directly adverse when one of the clients is asserting a claim against another client of the lawyer. Prof.Cond.R. 1.7, cmt. [11]. Furthermore, a lawyer may not act as an advocate in one proceeding against a person (or an entity) the lawyer represents in some other matter, even though the matters are wholly unrelated. *Id.* Applying the language of Comment [11] to this question, the lawyer may not act as an advocate for the claimants by arguing they are entitled to

workers' compensation benefits in proceedings against their employer when the employer is also a client of the lawyer in unrelated matters. If the lawyer undertakes the representation of the current client's employer, then the lawyer's current clients are directly adverse and a prohibited conflict exists. Prof.Cond.R. 1.7(a)(1).

The second consideration is whether there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for a client will be materially limited by the lawyer's responsibilities to another client or by the lawyer's own personal interest. When the lawyer is faced with the proposition of developing and maintaining a client-lawyer relationship with a potentially more lucrative client, the lawyer must consider if his or her personal interest in developing that relationship would impact the lawyer's ability to carry out the duties owed to the current clients. For example, the lawyer must consider whether he or she will be able to conduct a competent and thorough cross examination of a representative constituent of the employer due to his or her desire to build and maintain a relationship with a potentially more profitable or long-term client. The potential for compromise of the lawyer's duty of loyalty to the current clients is present in this situation if the lawyer conducts a deferential, rather than thorough, cross-examination of a constituent of the employer due to the lawyer's desire to remain in the employer's good graces.¹ The lawyer's own interest cannot not be permitted to have an adverse effect on his other current clients. Prof.Cond.R. 1.7, cmt. [20]. The Board is of the view that in such a situation there is a substantial risk of a material limitation conflict pursuant to Prof.Cond.R. 1.7(a)(2).

When a lawyer is faced with a conflict the lawyer must next determine if the representation is barred by either criteria in Prof.Cond.R. 1.7(c). Prof.Cond.R. 1.7(c)(1)-(2) prohibits a lawyer from undertaking representation that is prohibited by law or involves the assertion of a claim by one client against another in the same proceeding. Here, there is no indication that the representation is prohibited by law, and the representation does not involve the simultaneous representation of clients related to the assertion of a claim by one client against another client represented by the lawyer *in the same proceeding*. As a result, Prof.Cond.R. 1.7(c) does not preclude the representation.

The lawyer must now either decline the representation due to the conflict or comply with the additional requirements of Prof.Cond.R. 1.7(b). Prof.Cond.R. 1.7, cmt.

¹ See Adv. Op. 2013-4 (citing ABA Formal Op. 92-367 (1992)).

[2] and Prof.Cond.R. 1.7, cmt. [4]. The lawyer must evaluate whether the lawyer can provide competent and diligent representation to each affected client, and if so, each affected client must give informed consent, confirmed in writing. Prof.Cond.R. 1.7(b)(1)-(2). As discussed above, a relevant consideration remains as to whether the lawyer in this situation will alter his or her approach to the employer in order to remain in the employer's good graces. Again, although the Rules of Professional Conduct permit a lawyer, through informed consent, to accept or continue representation when faced with a material limitation conflict, the Board recommends that this type of representation under the circumstances posed by the question be avoided due to the conflicting professional and personal obligations noted in this opinion and the fact that these competing obligations likely prevent the competent and diligent representation of a client. *See* Adv. Op. 2016-12.

If after assessing the lawyer's relationship with the employer, claimant, and the matters at issue in the pending claims, the lawyer determines, in the exercise of his or her professional judgment, that he or she can provide competent and diligent representation to each affected client, the lawyer must seek informed written consent from each affected client to proceed. Prof.Cond.R. 1.7(b)(2). In order to obtain informed consent the lawyer must communicate to each affected client "adequate information and explanation of the material risks of representation and any reasonably available alternatives to the proposed course of conduct." Prof.Cond.R. 1.0(f). Obtaining informed, written consent from each affected client is the only way the lawyer in this situation would be able to undertake representation of the employer.

Question (1)(a)

Faced with a conflict and in the absence of informed consent, the question becomes whether the lawyer may withdraw from representation of the current client claimants solely to undertake representation of the employer in unrelated workers' compensation matters. A lawyer cannot accept representation in a matter unless it can be performed, among other things, without an improper conflict of interest. Further, a lawyer is obligated to carry to conclusion all matters undertaken for a client, unless the lawyer-client relationship is terminated as provided in Prof.Cond.R. 1.16. Prof.Cond.R. 1.16, cmt. [1] and Prof.Cond.R. 1.4, cmt. [4]. The decision of a lawyer to withdraw from representation should be made only on the basis of compelling circumstances and if any of eight enumerated situations are applicable. Prof.Cond.R. 1.16, cmt. [8A] and

Prof.Cond.R. 1.16(b)(1)-(8). An additional “catch-all” subsection also permits withdrawal if “other good cause for withdrawal exists.”² Prof.Cond.R. 1.16(b)(9).

The Board recognizes arguments can be made that withdrawal under these circumstances may be permitted pursuant to Prof.Cond.R. 1.16 if it can be accomplished without any material adverse effects on the interests of the clients. However, courts in Ohio, as well as other jurisdictions, have historically declined to uphold a practice, also referred to as the “hot potato” doctrine, of a lawyer withdrawing from representation of a less favorable client so that the lawyer or law firm may proceed with the less stringent conflict analysis required for former clients.³ As a result, a broad proposition has developed that “a law firm may not withdraw from a representation where the purpose is to undertake a new representation adverse to the first client, even in an unrelated matter, and apparently even if the withdrawal would not have an adverse impact on the client.” D.C. Ethics Op. 272 (1997)(citing Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* p. 480.1 (1996)).⁴

The Board acknowledges that the cases discussing the “hot potato” concept relate to various different areas, including motions for disqualification, and typically contain fact patterns that differ from the facts presented in this question. Commonly, a law firm’s current client has already initiated or desires to initiate a lawsuit against another current client in a wholly unrelated matter or a conflict is created due to a merger or acquisition. Despite the slightly differing facts here, the Board adopts the concept that withdrawing from the representation of one client in order to take on the representation of another is not ethically appropriate.⁵ In reaching this conclusion, the Board notes that the lawyer

² In order to withdraw, a lawyer is also required to obtain permission from a tribunal if required, take all steps practicable to protect the client’s interest, and promptly refund any part of the fee paid in advance. Client consent is no longer required. Prof.Cond.R. 1.16(c)-(e).

³ See, e.g., *Henry Filters, Inc. v. Peabody Barnes Inc.*, 82 Ohio App.3d 255, 261, 611 N.E.2d 873 (Wood 1992)(citing *Sarbey v. Nat’l City Bank*, 66 Ohio App.3d 1, 583 N.E.2d 392 (Summit 1990)); *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981); *Picker Int’l Inc. v. Varian Assocs. Inc.*, 670 F. Sup. 1363, 1365 (N.D. Ohio 1987); *Snapping Shoals Elec. Membership Corp. v. RLI Ins. Corp.*, 2006 WL 1877078 (N.D. Ga. July 5, 2006); *Pioneer- Standard Elecs., Inc. v. Cap Gemini Am., Inc.*, 2002 WL 553460 (N.D. Ohio Mar. 11, 2002); *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449 (S.D. N.Y. 2000).

⁴ It should be noted that D.C. Ethics Opinion 272 (1996) reached a conclusion contrary to the conclusion in this Advisory Opinion based on different facts and because the D.C. Rules of Professional Conduct vary from the Ohio Rules of Professional Conduct.

⁵ Withdrawn Adv. Op. 1988-24 contained a question about whether a lawyer may request fees for work completed prior to withdrawal. The Board has declined to address that question in the body of this opinion

requesting the opinion is aware, at the onset of representation, that a conflict will occur if he or she accepts representation. Therefore, there can be no claim that the conflict occurred as a result of an unforeseeable development and that the “thrust-upon” exception should apply.⁶ As stated in the *Scope*, “[t]he Ohio Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” Prof.Cond.R., *Scope* [14]. Furthermore, “the rules do not exhaust the moral and ethical considerations that should inform a lawyer ...” Prof.Cond.R., *Scope* [16].

As a result of the above-referenced review of the *Scope*, rules, and comments, the Board cautions that “good cause” for permissive withdrawal under Prof.Cond.R. 1.16 does not exist when a lawyer seeks to terminate the representation of a current client and cause the client to incur additional expense due to conduct attributable directly to the action of the lawyer and for the lawyer’s own personal benefit. Consequently, it is the opinion of the Board that the lawyer should not withdraw from representation of his or her current client claimants in order to undertake representation of the employer’s workers’ compensation matters and should refrain from representing the employer until all the pending workers compensation claims for his or her current clients are resolved.

Question (2)

Absent informed consent, a lawyer who has formerly represented a client in a matter cannot thereafter represent another person (or an entity) in the same or

because the Board does not have advisory authority related to matters of state law and does not find it ethically appropriate for a lawyer to withdraw from representation of a current client for the sole purpose of taking on representation of another, potentially more profitable, client. Nevertheless, the Board cautions lawyers that there is Ohio case law which finds that if a lawyer does not see a matter to conclusion and voluntarily withdraws without just cause, then a breach of contract has occurred under Ohio law, whether the contract’s payment terms were for an hourly rate or a contingent fee. *W. Wagner & G. Wagner Co., L.P.A. v. Block*, 107 Ohio App.3d 603, 669 N.E.2d 727 (6th Dist. Erie County 1995). Per the court in *W. Wagner*, the attorney cannot recover unless he or she had good cause to withdraw. *Id.*

⁶ Some courts have recognized an exception to the “hot potato” doctrine, which has become known as the “thrust-upon” exception. In those cases the court allowed the law firm to drop one client in order to continue representation on behalf of another client when the conflict did not exist at the onset of representation and the conflict was not created by the firm. *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio 1990); *Carlyle Towers Condo. Ass’n, Inc. v. Crossland Sav., FSB*, 944 F. Supp.341 (D.N.J. 1996).

substantially related matter in which that person's (or entity's) interests are materially adverse to the interests of the former client. Prof.Cond.R. 1.9(a). A substantially related matter is defined as one that involves the same legal transaction or dispute or one in which there is a substantial risk that confidential information normally obtained in the prior representation would materially advance the position of another client in a subsequent matter. Prof.Cond.R. 1.0(n). Further, a lawyer is prohibited from using any information relating to the representation of the former client to the disadvantage of the former client, unless specifically permitted by the rules or if the information has become generally known. Prof.Cond.R. 1.9(c)(1)-(2). The duty of confidentiality continues beyond formal conclusion of the lawyer-client relationship. Prof.Cond.R. 1.9, cmt. [1]. Clients must have the ability to disclose their problems freely and in depth to counsel, without fear that one day that information may be used against them. *Emle Industries Inc. v. Patentex, Inc.*, 478 F.2d 562, 570-71 (2d Cir. 1973).

If the lawyer is now representing the employer and the former client is still an employee of the employer, a new workers' compensation matter likely may be related to the former client's continued employment. In this instance, it is possible that confidential information provided by the former client to the lawyer about his or her employment could be used by the lawyer in the new subsequent matter to materially advance the position of the employer. Thus, it would be necessary for the former client to give informed consent, confirmed in writing, for the lawyer to represent the employer in a subsequent matter. Prof.Cond.R. 1.9(a). If the former client is no longer an employee of the employer and the new matter is not the same matter or substantially related to the former client's employment, then there would be no conflict in the lawyer representing the employer against the former client. For example, if the employer is a cable television company, and the former client, subsequent to the termination of his or her employment, failed to pay for cable services provided, the lawyer could represent the employer in a collections action against the former client.

Question (3)

The Rules of Professional Conduct do not specifically address if a lawyer may recommend a specific lawyer or list of lawyers to prospective clients when a lawyer is

unable to undertake representation.⁷ However, the Board recognizes that lawyers often decline representation of a prospective client and suggest names of other lawyers who may be able to provide representation. The apparent concern related to the question posed is whether the mere act of recommending a specific lawyer or list of lawyers will have an adverse effect on the interests of the lawyer's current client, and thus violate the lawyer's duty of loyalty to the current client.

Prof.Cond.R. 4.3, addresses a related, but slightly different situation, as to how a lawyer representing a current client in a matter should deal with an unrepresented adverse party. A lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel. Prof.Cond.R. 4.3. Thus, the rules clearly authorize the ability of a lawyer to suggest that an adverse party seek counsel. The Board is of the opinion that a lawyer does not violate his or her duty of loyalty to a client by going one step further to recommend a specific lawyer or list of lawyers to a prospective client, so long as the referral is made in good faith. For example, a lawyer should not refer a potential client to a person the lawyer believes to be incompetent or dishonest. In fact, in some instances, referring a prospective client to counsel may result in a more prompt and efficient resolution of a matter to the benefit of a current client. The best practice is to provide the prospective client with the names of several lawyers so that the prospective client may have ultimate control over the selection of a lawyer.

CONCLUSION: In evaluating the potential conflicts of interest related to a current client and a prospective new client, a lawyer must consider if the matters are directly adverse and whether there is a substantial risk that the lawyer's ability to effectively represent a client will be materially limited by the lawyer's responsibilities to another client, a former client, a third person, or the lawyer's own personal interests. In litigation, the representation of one client is considered directly adverse and a conflict when the client is asserting a claim against another client of the lawyer. Although the Ohio Rules of Professional Conduct permit a lawyer, through informed written consent, to accept or

⁷ The suggestion of employment of other counsel is referenced in the comments to Prof.Cond.R. 1.16 in relation to assisting a client upon permissive withdrawal. Specifically, Prof.Cond.R. 1.16, cmt. [8A], indicates that even when a lawyer justifiably withdraws, to protect the welfare of the client, the lawyer should, among other steps, suggest employment of other counsel. Thus, a lawyer may ethically recommend another lawyer to a former client after withdrawal. It is best practice to provide the former client with the names of several lawyers who may have the availability to represent the former client and the referral must be made in good faith.

continue representation when faced with a material limitation conflict, the Board recommends that this type of representation be avoided when possible due to the complicated circumstances that may hinder or prevent the competent and diligent representation of a client when a lawyer is faced with the type of conflicting professional and personal obligations presented in this opinion. In the event a lawyer does obtain informed written consent, a lawyer is still required to provide competent and diligent representation to each affected client. A lawyer may not withdraw from representation of a current client in order to undertake representation of the adverse party, even if the matters are unrelated. Regarding conflicts of interest related to former clients, absent informed written consent from a former client, a lawyer may not represent a former adverse party in a new matter against a former client if the new matter is the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client. However, if the new matter is not the same or a substantially related matter, the lawyer may represent the former adverse party. Finally, a lawyer who is unable to represent a prospective client due to a conflict may, in good faith, recommend another lawyer or list of lawyers to a prospective client without compromising the duty of loyalty owed to a current client. A lawyer should not refer a potential client to a person the lawyer believes to be incompetent or dishonest.